



Report to the Auburn City Council

Action Item
Agenda Item No. **12**

City Manager's Approval

To: City Council Members
From: Kevin Hanley, Mayor
Date: July 9, 2012
Subject: City Email Policy

The Issue

Shall the City Council give direction to staff to update the city's email policy and bring back the item for future consideration?

Conclusion and Recommendations

Give direction to staff to update the city's email policy and bring back the item for consideration at the next city council meeting.

Background

According to the article "Local Agency Electronic Media Use and California Public Records Law," *Western City*, June 2012, "Members of the public and local agency officials carrying out the public's business use electronic media to communicate, and this type of communication is increasing widespread. Local agencies also use electronic media for external and internal communication and to create, transmit and store official information." This article contains important information that can help the Auburn City Council craft a well-balanced email policy.

The City Council should periodically review and revise the city's email policy to achieve the public-policy goals of encouraging the free and unhindered communication from the public to City Council members, public access to public records, compliance with the open meetings laws pursuant to the Brown Act while, at the same time, exempting from public disclosure certain protection information as per the requirements of federal and state law. The City Council is also responsible for examining the cost to taxpayers in retaining and producing public records and emails upon request.

Fiscal Impact

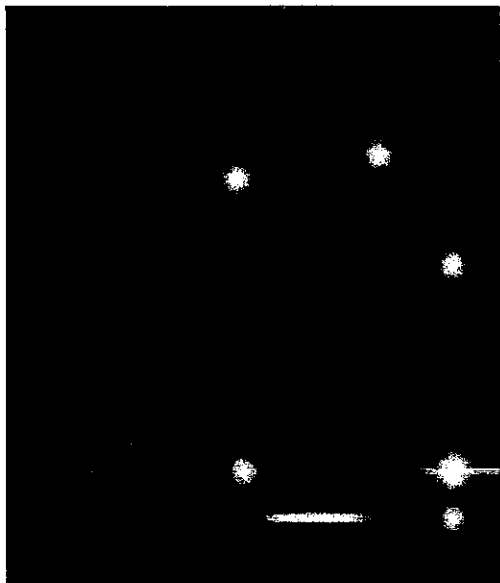
Based on City Council direction, staff will provide estimates of any additional costs regarding the need for expanded computer server capacity and any additional staff time in order to retain and produce public records and emails upon request.

Attachment: "Local Agency Electronic Media Use and California Public Records Law," *Western City*, June 2012.

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Local Agency Electronic Media Use and California Public Records Law

BY THE LEAGUE OF CALIFORNIA CITIES' COMMITTEE ON THE CALIFORNIA PUBLIC RECORDS ACT



The League's Committee on the California Public Records Act includes: Eric Danly (chair), Meyers Nave, city attorney for Cloverdale and Petaluma; Roy Hanley, Hanley and Fleishman, city attorney for King City and Solvang; Kimberly Hood, Best Best & Krieger, deputy city attorney for Davis; Craig Labadie, Law Offices of Craig Labadie, city attorney for Albany; Donald Larkin, assistant city attorney for Palo Alto; Joe Montes, Burke Williams & Sorensen, city attorney for Alhambra, Moorpark and Santa Clarita; Juli Scott, (*ex officio*), retired Burbank chief deputy city attorney; and Mario Zamora, Griswold, LaSalle, Cobb, Dowd & Gin, assistant city attorney for Hanford.

About Legal Notes

This column is provided as general information and not as legal advice. The law is constantly evolving, and attorneys can and do disagree about what the law requires. Local agencies interested in determining how the law applies in a particular situation should consult their local agency attorneys.

Members of the public and local agency officials carrying out the public's business use electronic media to communicate, and this type of communication is increasingly widespread. Local agencies also use electronic media for external and internal communications and to create, transmit and store official information.

This article provides an overview of the law affecting local agency electronic information, discusses some emerging electronic records issues affecting local agencies and offers suggestions regarding local agency electronic records programs. For a more extensive resource on records laws affecting California local agencies, see *The People's Business: A Guide to the California Public Records Act* (www.cacities.org/PRAGuide) and the 2011 supplement (www.cacities.org/PRAGuideSupp).

Public Right of Access to Local Agency Records

The California Public Records Act obligates state and local agencies to:

- Make agency records that are not exempt from disclosure available for inspection or copying during normal office hours; and
- Provide copies upon payment of the agency's duplication costs¹.

The public's right of access to agency records² has also been incorporated into the California Constitution.

The Public Records Act Applies to All Forms of Records

The Public Records Act applies to any information prepared, owned, used or kept by a state or local agency, regardless of the form in which the information is kept³. The act is intended to cover every conceivable kind of record involved in the governmental process, including every new form of record-keeping that is developed⁴.

Local agencies must be prepared to satisfy Public Records Act disclosure requirements for all current and future electronic records that are not exempt from disclosure. (For a list of common exemptions, see "Items Exempt From Disclosure" below.) All agency e-mails, Facebook pages, tweets, blogs, podcasts and other electronic communications and records not exempt from disclosure are subject to inspection and copying on request. Agencies that initiate the use of new electronic information media should anticipate the need to make electronic and hard copy records available under the Public Records Act.

Electronic Records Requirements Affecting Local Agencies

Some provisions of the Public Records Act and other statutes and case law directly address electronic records requirements that affect California local agencies.

Requests to Provide Records Electronically

Agencies must provide electronic copies of existing electronic records that are not exempt from disclosure in the format requested if it is a format in which the agency keeps the records or transmits them to other agencies⁵. Agencies may agree to produce requested electronic records that require data compilation, extraction or programming — but cannot be required to do so. When they agree to produce such records, agencies may charge the requester the cost of the required data compilation, extraction or programming⁶. To ensure reimbursement, agencies may wish to require a deposit prior to incurring such costs.

Posting Agency Personal Contact Information on the Internet

The Public Records Act prohibits posting an elected or appointed official's home address and telephone information on the Internet without first obtaining the official's written permission⁷. Agencies that post Statements of Financial Interests (also known as Form 700s) may wish to encourage use of officials' business addresses on the disclosure form.

Geographic Information Systems

Geographic information system "base map" data that is integrated with a local government agency-developed computer mapping system is not a public record subject to disclosure⁸.

Automated Traffic Enforcement System Photos

Photographs made by automated traffic enforcement systems (red light cameras) are confidential and may be made available only to governmental and law enforcement agencies — and only for the purpose of traffic control⁹.

Local Agency Review of Employee Text Messages

Local agency review of employee text message transcripts without a warrant as part of an administrative investigation may be consistent with the Fourth Amendment to the U.S. Constitution when the review is for non-investigatory, work-related purposes or for investigating work-related misconduct — if the measures used are reasonably related to the search objectives and are not excessively intrusive¹⁰. Local agencies may wish to consider adopting policies that govern the use of agency electronic communications systems. Such policies should address users' expectations of privacy in such systems, among other issues.

Emerging Issues Affecting Local Agencies

Given the dramatic increase in the use of electronic communications and information systems and the rapid, ongoing development of new electronic information devices, systems and uses, it is not surprising that there are a number of evolving electronic records issues affecting local agencies. Such issues include metadata, legislative body member e-mails and e-mail retention.

Metadata

Metadata is data about data that is contained in an electronic record. Metadata can reveal who created an electronic record and when, who has edited or viewed a record, and notes and commentary concerning an electronic record. Neither the Legislature nor the California courts have directly addressed how metadata should be treated under the Public Records Act. Courts in other jurisdictions have ruled that metadata embedded in electronic public agency records is subject to the same rules concerning disclosure and exemptions from disclosure as any other public agency electronic information¹¹. Local agencies should consider treating a records request for metadata in the same way they would treat any other electronic information — by providing all metadata not exempt from disclosure.

Legislative Body Member E-mails

Local agency legislative body members may send and receive e-mails concerning agency business. No published California case addresses the status of legislative body member e-mails sent on personal devices and accounts. However, a relatively recent trial court ruling may provide some helpful considerations regarding treatment of local agency legislative body member e-mails. The *Tracy Press* sued the City of Tracy and one of its city council members seeking an order to disclose e-mails between the council member and Lawrence Livermore National Laboratory members. The trial court ruled in the city's favor, relying on two main conclusions. First, the court held that the city council member was not covered by the definition of a "local agency" subject to the Public Records Act. Second, the court held that the e-mails, which were sent from the council member's home computer using her private e-mail account, did not meet the definition of public records prepared, owned, used or retained by a local agency under the Public Records Act. The *Tracy Press* appealed the trial court's ruling, and the court of appeal dismissed the case because the *Tracy Press* failed to name the council member as a defendant/respondent on appeal¹².

E-mail Retention

The Public Records Act is not a records retention statute; it is a records disclosure statute. Other laws govern retention of public records¹³. No statute defines what a "record" is for purposes of local agency records retention. The California attorney general has opined that local agency records for the purposes of records retention laws are those kept as required by law, or as necessary or convenient for the discharge of agency duties¹⁴. Therefore, local agencies appear to retain some discretion concerning which agency records, including electronic records such as e-mails, must or should be retained in the ordinary course of agency business. Nonetheless, some open government advocates have challenged local agency e-mail destruction policies and assert that all local agency records, including e-mails, must be kept a minimum of two years. Local agencies may wish to develop policies concerning disposition and storage of electronic records such as e-mails.

Conclusion

Local agencies increasingly rely on electronic communications and information systems. Agencies employing new electronic records and communication technologies should prepare to comply with records law requirements that apply to local agency electronic information. Local agencies should also be aware that their use of electronic records and information systems may raise legal issues under other laws such as open meetings laws, labor and employment laws, personal privacy laws, records retention laws and free speech laws, among others. Agency electronic communications and records policies should consider the full range of laws that may apply to agency electronic information.

Items Exempt From Disclosure

Some exemptions from disclosure that most frequently apply to public agency records and that are contained or recognized in the Public Records Act include those for:

- Signed referendum, initiative and recall petitions (Gov. Code 6253.5);
- Drafts not retained in the ordinary course of business (Gov. Code 6254(a));
- Pending litigation information (Gov. Code 6254(b));
- Personnel, medical and similar information that if disclosed would invade personal privacy (Gov. Code 6254(c));
- Law enforcement information (except specified information that must be disclosed) (Gov. Code 6254(f));
- Real estate appraisals for public property acquisition and engineering estimates for public construction (Gov. Code 6254(h));
- Records exempt or prohibited from being disclosed under other laws (Gov. Code 6254(k));
- Attorney-client privileged communications (Gov. Code 6254(k), Evid Code 1040);
- Attorney work product (Gov. Code 6254(k), Civ. Proc. Code 2018.030);
- Official information privileged records (Gov. Code 6254(k), Evid. Code 1040);
- Pre-decisional communications protected by the deliberative process privilege (Gov. Code 6255); and
- Information regarding which, based on the particular facts, the public interest in non-disclosure clearly outweighs the public interest in disclosure (Gov. Code 6255).

For a more extensive list and discussion of public agency records that are exempt from disclosure, see Chapter 4 of *The People's Business: A Guide to the California Public Records Act* (www.cacities.org/PRAGuide) and the latest supplement (www.cacities.org/PRAGuideSupp).

Footnotes:

¹ Gov't Code §6253(a). The Public Records Act does not apply to the California judiciary or legislature. The Legislative Open Records Act applies to the legislature.

² Cal. Const. Art I, §3(b)(1)

³ Gov't Code §6252(e), (g)

⁴ *Braun v. Taft* (1984) 154 Cal.App.3d 332

⁵ Gov't Code §6253.9(a)

⁶ Gov't Code §6253.9(b)

⁷ Gov't Code §6254.21

⁸ *Sierra Club v. Superior Court* (2011) 195 Cal.App.4th 1537. (But see *County of Santa Clara v. Superior Court* (2009) 170 Cal.App.4th 1301, holding that the public interest or "catch all" exemption in the Public Records Act alone did not justify withholding Geographic Information System base map information.)

⁹ Veh. Code §21455.5(e)

¹⁰ *City of Ontario v. Quon* (2010) 130 S.Ct. 2619

¹¹ See, e.g., *Lake v. City of Phoenix* (2009) 222 Ariz. 547

¹² *Tracy Press, Inc. v. Superior Court of San Joaquin County (City of Tracy)* (2008) 164 Cal.App.4th 1290

¹³ See, e.g., Gov't Code §34090

¹⁴ 64 Ops.Cal.Atty.Gen 317 (1981)